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IN THE

Supreme Court of the United States

October Term, 1958

No. 232

MILTON KOBLITZ,

Petitioner,

AGAINST

THE BALTIMORE AND OHIO RAILROAD COMPANY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Milton Koblitz, on behalf of himself and on behalf of all other owners and holders of The Chicago and Alton Railroad 3% Refunding Mortgage Bonds (hereinafter called Alton Bonds) originally in the face amount of $45,350,000., prays that a writ of certiorari issue to review a judgment of the United States Court of Appeals for the Second Circuit, entered on April 28th, 1959 (pp. 48a-49a).* The judgment affirmed a judgment of the United States District Court for the Southern District of New York which dismissed the complaint on the ground that the action was barred by two judgments in *Rieser, Koblitz, et al.* v. *The Baltimore and Ohio Railroad Company* (hereafter called B. & O.), which the plaintiff and others had previously brought against the same defendant.

* Reference is to pages in the certified record.

Opinions Below

The opinion of the District Court is reported in 164 F. Supp. 367 and appears at page 10 (a) of the certified record. The opinion of the United States Court of Appeals is reported in 266 F. 2d 320. A copy of the opinion is appended to this petition at page 16.

There are also appended to this petition the opinion of Murphy, D.J., in the *Rieser* case at page 18 and the opinion of the United States Court of Appeals affirming the judgment in the *Rieser* case at page 38. The opinion of Murphy, D.J., is reported in 123 F. Supp. 44. The opinion of the United States Court of Appeals is reported in 228 F. 2d 563.

Jurisdiction

The judgment of the United States Court of Appeals for the Second Circuit was entered and dated April 28th, 1959.

Jurisdiction to review this case is found in 28 U. S. C. 1254.

Questions Presented

1. Are the judgments in the action *Rieser, et al.* v. *The Baltimore and Ohio Railroad Company,* a bar to the instant action?

2. Who is injured by the fraudulent diversion of assets by a wholly owned subsidiary to its parent—the wholly owned subsidiary or the subsidiary's creditors?

3. Is the claim of creditors of a wholly owned subsidiary against the parent, to whom the subsidiary fraudulently diverted assets, derivative or direct and independent?

4. If the claim is direct and independent, does a creditor by bringing a derivative action in the right of a subsidiary, which is dismissed, lose his right to bring a direct and independent action against the parent to account for property conveyed to it in fraud of the subsidiary's creditors?

Statement

This action was originally brought in the Supreme Court of the State of New York, in and for the County of New York, and was removed by the defendant to the United States District Court for the Southern District of New York on the ground of diversity of citizenship (pp. 23a-24a).

The plaintiff the owner of $50,000 face amount of Alton Bonds sued on behalf of himself and on behalf of the other owners of Alton Bonds to compel B. & O. to account for property which Alton, its wholly owned subsidiary transferred to it in fraud of Alton's creditors (p. 2a).

The right to bring such an action was expressly granted to the holders of Alton Bonds by the United States District Court for the Northern District of Illinois, Eastern Division, in the reorganization of Alton, pursuant to Section 77 of the Bankruptcy Act (pp. 6a-7a).

In the erroneous belief that the diversion of assets by a wholly owned subsidiary to its parent gave the wholly owned subsidiary a cause of action against the parent, the plaintiffs in the *Rieser* case brought a derivative action in the right of Alton against B. & O.

The complaint in that action was dismissed on defendant's motion for summary judgment on the ground that Alton's alleged claim against B. & O. was barred by the Statute of Limitations and was therefore not available to